

No. 17396 ✓

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HARVEL H. COSPER AND STELLA COSPER,
Appellants,
vs.
SOUTHERN PACIFIC COMPANY, a corporation,
Appellee

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

Plaintiffs in their complaint against defendant alleged themselves to be citizens of the State of Arizona and defendant to be a corporation organized and existing under the law of the State of Delaware. The jurisdiction of the court was based on this diversity of citizenship, and the matter in controversy, exclusive of interest and costs, exceeded ten thousand dollars. 28 U.S.C.A. § 1332.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

Cosper v. Southern Pacific Company is an action for damages and equitable relief arising from appellant's claim that appellee breached an implied contract to maintain ditches and dikes on an easement granted by appellants' predecessors in interest to appellee's predecessors in interest. At the close of the trial by jury the issues were submitted by the trial court to the jury. On the issue of the defense of "act of God" the trial court instructed the jury as follows:

"You are instructed that the defense of an act of God does not relieve the defendant from responsibility for damages resulting from breach of contract, if you find such a breach, but should be considered solely in determining what portion of plaintiffs' damage, if any, was actually caused by the defendant's alleged breach of contract."

The trial court then defined "act of God" and further instructed the jury as follows:

"If the jury find, from the evidence and under these instructions, that defendant was guilty of a breach of contract and that as a result of such breach plaintiffs suffered damage which could have been prevented by defendant's maintenance of the ditches and dikes, then the damage was not produced by an act of God within the meaning of the law."

The jury deliberated for approximately seven hours and then reconvened to request clarification of certain issues by the trial court. In response to a written question, the trial court stated:

"Yes, the question as I interpret it, it's not in the form of a question, is whether or not you could find for the plaintiff but no money for compensation. I take it that you have in mind, or if this is what you have in mind, that you find that there was an obligation to keep the dyke and ditch in repair, and that it was breached but that the plaintiffs were not damaged, could you return a verdict in their favor and give them no money since they had no damages. I take it that's the sense of the question?"

The jury foreman responded:

"Your Honor, our thought behind this was that, through

damage, the damage to the plaintiffs' property was caused by an act uncontrollable by man or an act of God, but there was a moral obligation in the maintenance of the ditches and dykes."

The trial court then instructed the jury as follows:

"Well, let me say that if you found the damage was caused by an act of God, and that it could not have been prevented by the compliance with the contract, then there would be—your verdict would have to be for the defendant. In other words, if the damage was caused by an act of God and it couldn't have been prevented if the defendant had carried out its contract, it would have happened anyway because of the forces of nature, then your verdict would be for the defendant, if that is what you found."

The jury then retired and, after deliberating approximately fifteen minutes, returned a verdict for appellee.

Appellants made a timely motion for a new trial on the grounds that the trial court had committed prejudicial error by erroneously instructing the jury upon their reconvening and instructing the jury in conflict with the trial court's previous instruction on act of God. Appellee resisted appellants motion on the grounds that both instructions were accurate statements of the law and not in conflict and would not be prejudicial error even if conflicting. The trial court denied appellants' motion for new trial and entered judgment upon the verdict.

SPECIFICATIONS OF ERROR

1. Appellant assigns as error to the trial court the following instruction to the jury:

"Well, let me say that if you found that the damage was caused by an act of God, and that it could not have been prevented by the compliance with the contract, then there would be—your verdict would have to be for the defendant. In other words, if the damage was caused by an act of God and it couldn't have been prevented if defendant had carried out its contract, it would have happened anyway because of the forces of nature, then your verdict would be for the defendant, if that is what you found."

for the reason that appellants are entitled to a verdict for nominal damages if the jury finds that appellee breached its contract.

2. Appellant assigns as error to the trial court the conflict between the instruction set out in Specification Number One and the following instruction:

"You are instructed that the defense of an act of God does not relieve the defendant from responsibility for damages resulting from breach of contract, if you find such a breach, but should be considered solely in determining what portion of plaintiffs' damage, if any, was actually caused by the defendant's alleged breach of contract. By the term "act of God" is meant something superhuman—something beyond the power of man to guard against. It means inevitable accident—something that happens without the intervention of man. By the term "act of God" is meant those events and accidents which proceed from natural causes, and cannot be anticipated and guarded against, or resisted. If the Jury find, from the evidence and under these instructions, that defendant was guilty of a breach of contract and that as a result of such breach plaintiffs suffered damage which maintenance of the ditch and dikes, then the damage was not produced by an act of God, within the meaning of the law."

on the grounds that the jury was misled and confused by the conflict.

For convenience, the instruction set forth in Specification of Error No. One shall be referred to hereafter as the "latter instruction." The instruction set forth in Specification of Error No. Two shall be referred to as the "former instruction." The Transcript of Record shall be referred to as "T.R."

SUMMARY OF ARGUMENT

I

Appellants' position is that the latter instruction is an erroneous statement of law for the reason that even if the jury finds that appellants' damage was caused by an act of God, the jury may still find that appellee had breached its contract and return a verdict of nominal damage for appellants. This error was clearly prejudicial because the jury's question to the court was, in substance, asking whether the jury could return a nominal verdict. A verdict of nominal damage in favor of appellants and a judgment entered thereon would be extremely valuable to appellants in this case because it would determine appellants' right to the protection of appellee's ditches and dikes in the future.

II

Appellants' position is that the former instruction is in conflict with the latter instruction, that this conflict is error, and that the verdict of the jury was prejudicially affected thereby. The former instruction, in substance, tells the jury that they are not to consider the defense of an act of God in determining whether the alleged contract existed and whether appellee's had breached that contract, but to consider the defense of an act of God solely in determining what portion of appellants' damage was actually caused by appellee's breach.

The latter instruction tells the jury that if appellants' damage was the result of an act of God, then there is no liability on the part of the appellee. When considered together with the question asked by the jury, as stated by the trial court, at T.R. page 16, the trial court is charging the jury that damage caused by appellee's breach of contract is necessary to sustain a verdict for appellant. We respectfully submit that these two propositions are diametrically opposed and irreconcilably in conflict.

ARGUMENT

I

The law is universally clear that a breach of contract gives rise to a cause of action and that relief shall be granted in the form of a judgment for nominal damages, if no actual damages result from the breach. RESTATEMENT, CONTRACTS, § 328:

"Where a right of action for breach exists, but no harm was caused by the breach, or the amount of harm caused thereby is not substantial or is not so established that compensatory damages will be given under the rule stated in § 329, judgment will be given for nominal damages, a small sum fixed without regard to the amount of harm."

The above rule was stated in *Derby v. Westminster Foundation of Ohio*, 103 N.E. 2d 10, at 12:

"A breach of contract always creates a right of action, but a breach sometimes occurs without causing substantial damages. In such case the plaintiff can recover nominal damages."

In *Hilliard v. Newberry*, 153 N.C. 104, 68 S.E. 1056 the court stated:

" . . . when the obligation amounts to a binding agreement to do or refrain from doing some definite specific thing materially affecting the rights of the parties, an action will presently lie for breach of such an agreement and no damage need be shown."

In order to place the latter instruction in context, the question presented to the court, as stated by the trial court at T.R. page 16 must be considered. There the trial court stated that the question was: if the jury find that there was a contract and that it was breached, but that the plaintiffs were not damaged, could the jury return a verdict in favor of plaintiff for no damages? The jury foreman, at T.R. page 17 clarified the question by stating that the jury's thought was that any damage which in fact existed was caused by an act of God. The trial court then gave the jury the latter instruction which, in substance, told the jury that if the plaintiffs' damages were caused by an act of God and could not

have been prevented by defendant fulfilling its obligation under the contract, then the verdict should be for the defendant. We submit that this instruction, when given in answer to the question presented to the trial court, in unquestionably error.

That the erroneous latter instruction was prejudicial to plaintiff appears on the face of the transcript of record. The jury asked the trial court at T.R. page 16 whether it could find for the plaintiffs with no damages. It can only be assumed that the jury was considering such a verdict. The erroneous latter instruction at T.R. page 17 precludes the jury from considering such a verdict.

A verdict for nominal damages in this case cannot be considered a trivial thing, for a judgment entered on such a verdict would be *res adjudicata* between the appellants and appellee and would fix appellants' right to the future protection of appellee's ditches and dikes.

II

A reading of the former instruction and the latter instruction presents an irreconcilable conflict. The former instruction tells the jury that they are to consider the defense of an act of God solely in determining what portion of appellants' damage was actually caused by appellee's breach if any. The latter instruction tells the jury that appellee incurs no liability in contract if the plaintiff's damage was caused by an act of God. Such a conflict can, and obviously did, only confuse and mislead the jury.

Conflicting instructions are prejudicial error, and almost universally grounds for reversal. *Pipoly v. Benson*, 28 Cal. 2d 366, 125 P 2d 482, 147 A.L.R. 515, *Hoeft v. State*, 221 Iowa 694, 266 N.W. 571, 104 A.L.R. 1008, *Metropolitan Life Ins. Co. v. Alterovitz*, 214 Ind. 186, 14 N.E. 2d 570, 117 A.L.R. 770, *Tyrrell v. Prudential Life Ins. Co.*, 109 Vt. 6, 192 Atl. 184, 115 A.L.R. 392. See also numerous cases cited in American Jurisprudence, Appeal and Error, § 1108.

CONCLUSION

In this case the jury deliberated for approximately seven hours without reaching a verdict and then reconvened to seek clarification of certain issues. At this time the latter instruction, assigned as error, was given. The jury retired and, in less than fifteen minutes, reached the verdict they could not agree upon in the previous seven hours. This leads to the inescapable conclusion that the latter instruction given the jury eliminated the theory upon which the jury was considering a verdict for plaintiff. The foreman's comments at T.R. pages 16 and 17 substantiate this. Had the jury been correctly instructed upon the law when they reconvened, there is little doubt that the outcome of the trial would have been different.

The prejudicial errors committed by the trial court can only be corrected by the reversal of the judgment and the trial court's order denying appellant's motion for a new trial and remanding this case with the direction that a new trial be had.

Respectfully submitted

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